No. 96-1866

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ALIDA STAR GEBSER AND ALIDA JEAN MCCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND NEW JERSEY SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a school district that receives federal funds can be held liable under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), for sexual abuse of a student by a teacher when the school district had neither actual nor constructive knowledge of that abuse.

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IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards association, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin

Islands, and the Commonwealth of Puerto Rico.[1] Founded in 1940, NSBA represents the nation's 95,000 school board members who, in turn, govern 15,173 local school districts that serve more than 40 million public school students--approximately 90 percent of all elementary and secondary students in the nation. The New Jersey School Boards Association (NJSBA) is a statutory, nonprofit organization, comprised of approximately 600 boards of education in the State of New Jersey.

Amici strongly believe in the policy of non-discrimination behind Title IX of the Education Amendments of 1972. NSBA has had resolutions condemning discrimination for many years. The resolution adopted by NSBA's Delegate Assembly at its national convention in 1997 reads as follows:

> NSBA believes that all public school districts should adopt and distribute policies stating that racial and sexual harassment against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective grievance mechanism.
>
> Districts should institute in-service programs to train teachers and administrators to recognize sexual and racial harassment against employees and students and to investigate complaints. Education programs for students should also be instituted to eliminate sexual and racial harassment by students and peers.

[1] The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the amicus curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici agree with the decisions and analysis of the Fifth, Seventh, and Eleventh circuit courts of appeals and urge this Court to adopt the standard expressed in those cases. A liability standard that requires actual knowledge by school administrators is protective of student rights and is consistent with Title IX's history, language, and purpose. The proposals advanced by the Petitioners are contrary to the plain meaning and purpose of Title IX and will not reduce the risk of sexual harassment in the schools.

Moreover, the Petitioners' proposals would have a devastating financial impact on the nation's public schools, a consequence that would disserve all students. Jury verdicts in teacher/student abuse cases often reach into the millions. Although abuse of minors is reprehensible, Congress did not intend to jeopardize school district funds in the absence of institutional wrongdoing.

The Petitioners erroneously describe the Office of Civil Rights Sexual Harassment Guidance as articulating the longstanding position of the Department of Education. The 1997 Guidance was recently adopted in the course of other litigation, should not be applied retroactively, and should not form the legal basis for the availability of Title IX damages. The 1997 Guidance should not be used to override the legal analysis from Fifth, Seventh and Eleventh circuit courts.

This Court should reject the Petitioners' request to apply Title VII standards to Title IX. The numerous differences between Title VII and Title IX preclude wholesale application of Title VII jurisprudence to Title IX cases. Title IX is a

Spending Clause statute. Only intentional acts of the federal grant recipient should trigger Title IX liability. Theories of agency liability and detailed procedural requirements are critical to Title VII liability. No such provisions are found in Title IX.

Title IX should not be used to impose an affirmative duty to ensure that harassment will not occur. This standard ignores the secretive nature of sexual abuse, exceeds the scope of Title IX, and creates unrealistic guarantees.

If the Court were to adopt the Petitioners' proposals, the Court in effect would be amending Title IX, not merely interpreting it. As this Court observed in one of its original Title IX opinions, "policy considerations" are "for Congress to weigh, and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice."[2] Here, the legislative choice of Congress prevents open-ended damages claims that are based on the illegal acts of rogue school employees.

ARGUMENT

I. Liability without fault is contrary to congressional intent and would be financially devastating for the nation's public schools.

If the public schools are subjected to vicarious liability as desired by the Petitioners, then many schools will face damages verdicts that actually exceed their annual federal funding. For example, in 1995-96, Lago Vista ISD, with a student population of 656, received just $126,385 in federal

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[2] *North Haven Board of Education v. Bell*, 456 U.S. 512, 535, n.26 (1982).

aid.[3] That figure is miniscule compared to the $1.4 million dollar verdict in one recent Title IX case.[4] Most school districts could not weather the storm of such a verdict. For example, while Texas has 1,043 school districts, 820 of them have less than 1,600 students and have correspondingly small budgets.[5]

When a school accepts federal aid, it "weighs the benefits and burdens before accepting the funds." *Guardians Association v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 596 (1983). If one of the "burdens" of accepting the funds is to guarantee that no teacher will ever abuse a student, many school districts will simply reject federal money and attempt to make up the difference with an increase in local property taxes or other revenues sources. Surely Congress did not intend to *discourage* schools from accepting federal aid. *Cf. id.* 603 n. 24 (the "salutary deterrent effect of a compensatory remedy" may be "outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs").

Even the existence of insurance does not assuage the impact of Petitioners' broad proposals. Many insurance companies have imposed huge premiums for coverage of incidents involving sexual abuse of minors or, worse, they have refused to cover this type of claim, forcing school districts to self-insure. *See Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695 (5th Cir. 1996); *see also John R. v.*

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[3] Texas Education Agency, Division of Performance Reporting, *Snapshot '96: 1995-96 School District Profiles*, p. 314-318 [hereinafter Texas Education Agency].

[4] *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996).

[5] Texas Education Agency, *Snapshot '96*, at 5.

Oakland Unified Sch. Dist., 769 P.2d 948, 956 (Calif. 1989) (vicarious liability for sexual torts would make insurance "even harder to obtain, and could lead to the diversion of needed funds from the classroom").

Although sexual harassment of students is repugnant, schools cannot afford to perform the role of insurer, particularly with respect to incidents that occur off campus and under a cloak of secrecy. School funds must be reserved for the education of children. Congress did not intend to jeopardize school district funds in the absence of institutional wrongdoing. When large damages verdicts are awarded against a school district, "everyone but a random plaintiff loses." *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947 (W.D. Tex. 1994), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

II. The Office for Civil Right's Sexual Harassment Guidance deserves no deference. The Guidance was created for purposes of litigation, 25 years after passage of Title IX. Moreover, OCR expertise is irrelevant to the question of when damages are available.

Contrary to the briefs of the Petitioners and the United States, the Department of Education has not had a "longstanding" position concerning liability for sexual harassment in the primary and secondary schools. The Sexual Harassment Guidance issued in March 1997 by the Office for Civil Rights represents a new statement of position by OCR. *See* Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12039 (1997) [hereinafter 1997 Guidance]. While agency interpretations of a statute are entitled to deference if they are "longstanding," *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n. 11 (1982),

where the agency's position has not been demonstrably consistent over time or is unclear, then the interpretation is not owed any deference. *See id.* at 522 n. 11 and 538 n. 29.

Until the issuance of the 1997 Guidance, neither the Department of Education nor its Office for Civil Rights had published any policy statements on sexual harassment in the primary and secondary schools. The Department of Education's Title IX regulations were and are completely silent on the subject of sexual harassment. *See* 34 C.F.R. §§ 106.01-106.61 (1995). In contrast, the regulations provide explicit detail concerning the administration of athletics, admissions policies, housing, and the like. *Id.*

Perhaps reflecting Title IX's origin as a statute to end discrimination in higher education, OCR's original focus was the *university* setting. Two classic examples are documents cited by the Petitioners: a 1981 internal memo by OCR on harassment in higher education and a 1984 pamphlet concerning harassment of university students. *See* OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)[6]; "Sexual Harassment: It's Not Academic" (OCR pamphlet, August 1984). For whatever reason, OCR did not recognize sexual harassment as a concern in the public schools and did not attempt to provide any guidance or instruction to the nation's public schools.

As recently as November 1993, the OCR was still telling public schools that it had yet to develop a policy guidance addressing the unique environment of the public

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[6] The Petitioners' Brief states that the 1981 memo "declared" that the Title VII standards will apply to Title IX claims. Although the memo summarizes the Title VII standard, Section IV of the memo indicates that an "unresolved issue" is the applicability of various Title VII concepts.

schools. *See* Appendix A, Letter of Stacey Roseberry, Attorney Advisor, Elementary and Secondary Education Policy Division, Office for Civil Rights (Nov. 12, 1993).

The 1981 and 1984 documents are unhelpful in answering the Question Presented for yet another reason. Although both documents refer to institutional "liability" or "responsibility," they clearly are not references to an institution's liability for *money damages* because such damages did not exist under Title VII until 1991,[7] and they did not exist under Title IX until *Franklin v. Gwinnett County Public Schools* was decided in 1992.[8] Indeed, during this Court's consideration of *Franklin*, the United States filed an amicus brief *opposing* money damages for Title IX claims. Rather than represent a "longstanding" position, the 1997 Guidance represents a new statement of position concerning the availability of damages and the circumstances under which those damages might become available.

OCR's jurisdiction is to provide guidance on what acts constitute discrimination and what affirmative steps schools should take to prevent and investigate claims. OCR expertise is irrelevant to the question of whether damages are available under Title IX, "a function clearly within the purview of judicial competence." *Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066, 1075 (2nd Cir. 1984). The usual factors supporting deference--including contemporaneous adoption with the statute, agency expertise, and formality--are missing in this instance. *See generally Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1033-34 (7th Cir. 1997)(the 1997 Sexual

[7] Damages first became available with the passage of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

[8] 503 U.S. 60 (1992).

Harassment Guidance is neither a regulation nor an interpretation of a regulation); *see also Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (listing deference factors); *Batteron v. Francis*, 432 U.S. 416, 425 n. 9 (1977) (timing of the agency's position is a factor as is the expertise of the agency over the subject matter); *Board of Education v. Harris*, 622 F.2d 599 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981) (declining to defer to agency position that did not involve agency's expertise); *Capitano*, 732 F.2d at 1075 (rejecting interpretation because it was not contemporaneous with statute).

Finally, the 1997 Guidance deserves no deference because it appears that it was written for purposes of litigation. Although it purports to be an information tool for non-lawyer school employees, the 1997 Guidance, with its extensive lawyerly footnotes, represents OCR's articulation of its litigation posture. The first draft of the Guidance was published on August 14, 1996--just in time for inclusion in an amicus brief filed that week by the United States in support of the petition for writ of certiorari in another Title IX case, *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996).[9] The agency refused public comment on the substance of the draft Guidance. 61 Fed. Reg. 42728 (Aug. 14, 1996). The agency's apparent rush to create the Guidance in time for filing with this Court in *Rowinsky*, combined with the agency's refusal to take public comment, undercuts any deference argument. See, e.g., *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (agency's interpretations for purposes of litigation deserve no deference).

Even if the 1997 Guidance were valid, its new liability standards should not be applied retroactively. *Smith*, 128 F.3d at 1014; *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d

[9] *See* Brief of United States in No. 96-4, p. 2 & 11 (August 1996).

648, 658 (5th Cir. 1997) (Department of Education "cannot modify past agreements with [federal grant] recipients by unilaterally issuing guidelines through the Department of Education"); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 1497 (1994) (conduct ordinarily should be assessed under the law that existed when the conduct took place). The 1997 Guidance fails to provide a clear statement of retroactive intent, and Title IX itself contains no language authorizing the Department of Education to promulgate retroactive rules. *See* 20 U.S.C. § 1682. A general grant of rulemaking authority does not constitute authority to promulgate retroactive rules. *See Wright v. Director, Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1572 (11th Cir. 1990); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 213 (1988) (agency's power is limited to the authority delegated by Congress).

III. Under Title IX, only the acts of the federal grant recipient may trigger liability. Title IX's language and purpose preclude damages for sexual abuse by teachers unless the recipient's administrators knew about the abuse and failed to take corrective action.

A. *Substantial differences between Title IX and Title VII strongly counsel against adoption of the Title VII liability scheme.*

The Petitioners argue that the liability standard under Title IX should be the same or even broader than the liability standards under Title VII of the Civil Rights Act of 1964.[10]

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[10] 42 U.S.C. § 2000e (1994). Title VII permits employer liability based on agency or *respondeat superior* principles. 29 C.F.R. § 1604.11

While both Title IX and Title VII share a common prohibition against "sexual discrimination,"[11] the courts "must not fail to give effect to the differences between them." *North Haven*, 456 U.S. 512, 530 (1982). Analysis of the two statutes reveals those differences, which strongly counsels against adoption of Title VII liability standards in Title IX harassment cases.

Although several courts of appeals have adopted Title VII liability standards for Title IX cases, the analysis in these cases generally is limited and conclusory, with the courts turning to Title VII because it was convenient and not because Title IX itself demanded this result.[12] Other courts have recognized that it is improper to "blandly blur the distinctions" between Title VII and Title IX,[13] with three courts of appeals expressly rejecting the Title VII analogy proposed by the

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(1985); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986).

[11] Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). Title VII makes it unlawful "for an employer...to discriminate against any individual with respect to his...conditions...of employment" because of the person's sex. 42 U.S.C. § 2000e-2(a)(1) (1994).

[12] *See, e.g., Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2nd Cir. 1995); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996). One of the cases cited by the Petitioners--*Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 899 (1st Cir. 1988)--used a Title VII analogy, but the case did not involve any request for monetary damages. 864 F.2d at 884.

[13] *Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 145 (W.D. Pa. 1989) (refusing to "to transfer wholesale the EEOC guidelines into an area for which they were not drafted"), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989).

Petitioners.[14]

A major difference between Title IX and Title VII is that Title IX is Spending Clause legislation and its damages action is implied.[15] The Spending Clause enables Congress to place conditions on the receipt of federal dollars by grant recipients. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The legitimacy of the spending power is the recipient's *voluntary* and *knowing* acceptance of the conditions attached to the money. *Id.* Congress must articulate the conditions "unambiguously." *Id.* Vicarious liability for employee sexual harassment has never been an "unambiguous" part of the Title IX contract. *See Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996) (schools were not given notice); *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1030 (7th Cir. 1997) (same). Unlike Title VII's guidelines,[16] Title IX's regulations are completely silent on sexual harassment and the standard of liability.[17] The first reported case involving sexual harassment in the primary or secondary schools did not even appear until 1990 with the Eleventh Circuit decision in *Franklin v. Gwinnett County Public Schools*,[18] which rejected

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[14] *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014 (7th Cir. 1997); *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 (11th Cir. Jan. 20, 1998).

[15] Amici acknowledge that the Court has not expressly ruled on this point. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 n. 8 (1992).

[16] 29 C.F.R. § 1604.11 (1985).

[17] 34 C.F.R. § 106.01-106.61 (1995).

[18] 911 F.2d 617 (11th Cir. 1990), *rev'd*, 503 U.S. 60 (1992).

liability for damages. It defies reality to suggest that school districts in the 1980s or 1990s understood that they would be held vicariouly liable in damages for sexual misconduct by teachers.

B. *The Title VII liability standard is tempered by several employer-protective provisions--including a cap on damages--which indicate general congressional reluctance to open the door to large damages claims in discrimination cases. It is unfathomable to believe that Congress wanted to expose non-profit public schools to huge judgments, while protecting large for-profit corporations.*

Although the Title VII standard of liability permits employer liability even in the absence of actual knowledge, the Title VII standard is tempered by statutory provisions that protect employers from large judgments and stale claims. These include a cap on damages, a short statute of limitations, and a mandatory exhaustion-of-remedies provision that keeps many disputes out of court.

First, Title VII contains limitations on the damages that are recoverable. Damages were not even available under Title VII until 1991 when Congress enacted Section 1981a, which permits limited damages based on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3) (1994). Title IX is notably missing from Section 1981a, which suggests that, "in 1991, Congress did not view Title IX as the kind of legislation that could generate expansive liability." *Rosa H.*, 106 F.3d at 68 n. 4. If Lago Vista ISD, an employer of less than 101 people,[19]

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[19] Texas Education Agency, *supra* note 3, p. 316.

were sued under Title VII by an employee, its maximum potential damages under Section 1981a would be *$50,000. See* 42 U.S.C. § 1981a(b)(3)(A). This damages figure is in sharp contrast to the $1.4 million dollar Title IX verdict in *Canutillo*. It is unfathomable to believe that Congress wanted to expose non-profit public schools to huge judgments, while protecting large for-profit corporations. Even after *Franklin*, Congress has not acted to add Title IX to the list in Section 1981a.

Second, unlike Title VII, which contains a statute of limitations of less than one year,[20] Title IX has no statute of limitations. Federal courts must turn to the personal injury statute of limitations of the state where the case is filed.[21] In Texas, the statute of limitations for minors is tolled until age 20, unless the case involves sexual abuse, in which case the statute is tolled until age 23.[22] A student who is molested in elementary school thus may wait until she is in college to file suit, compounding the difficulty of both prosecution and defense.

Third, Title VII claimants must exhaust administrative remedies before filing suit. 42 U.S.C. § 2000e-5(b). This allows conciliation or elimination of many disputes without litigation.

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[20] 42 U.S.C. § 2000e-5.

[21] *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74 (3rd Cir. 1989); *Egerdahl v. Hibbing Community College*, 72 F.3d 615 (8th Cir. 1995); *see generally Wilson v. Garcia*, 471 U.S. 261 (1985) (if a federal statute does not have a limitations provision, court will borrow analogous state law).

[22] Tex. Civ. Prac. & Rem. Code §§ 16.001 & 16.0045 (West Supp. 1998).

C. *Under Title VII, the culpable party is the "employer" and its "agents." Under Title IX, the only culpable party is the federal grant recipient, which is defined as the entity that has been given legal authority by the state for "administrative control" of school services.*

Title VII defines "employer" to include the employer's "agents." 42 U.S.C. § 2000e(b); *see generally Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 72 (1986) (although common-law agency principles are not transferable "in all their particulars," courts should look to common-law agency principles for liability determination). In contrast, Title IX does not instruct courts to impose liability based on anything other than the acts of the recipient of the federal funds. *See* 20 U.S.C. § 1681; *Rosa H.*, 106 F.3d at 654. Under Title IX, only "institutional misconduct is the basis for institutional liability." *Floyd*, 1998 WL 17093, at 2.

The statute and regulations firmly support this conclusion. Title IX states that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving federal financial assistance*." 20 U.S.C. § 1681(a) (emphasis added). A "program or activity" refers to the "operations" of the "local educational agency." 20 U.S.C. § 1687. The phrase "local educational agency," in turn, is defined according to 20 U.S.C. § 8801.[23] Section 8801(18) defines "local educational agency" as a "public board of education" or other "public authority" the entity that has been

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[23] Title VI also defines "program or activity" as the "operations" of a local educational agency as defined in section 8801 of Title 20. *See* 42 U.S.C. § 2000d-4a(B).

given legal authority *by the state* for "administrative control or direction of" school services. *See also* 34 C.F.R. § 106.2(h) (1989) (defining "recipient" as any state or local political subdivision).[24]

As in municipal liability cases under 42 U.S.C. § 1983, in which the identity of the municipal tortfeasor is a question of state law,[25] state law determines the identity of the Title IX recipient. *See Smith*, 128 F.3d at 1020; *Floyd*, 1998 WL 17093, at 3. Courts must determine which individuals possess lawful administrative control of the programs and activities of the school system. In Texas, for example, the board of trustees controls the operation of the school system and is the only entity that can receive money on behalf of the district. *See* Tex. Educ. Code §§ 11.002, 11.151, 11.152 (West 1996). The board of trustees, however, may delegate authority to the superintendent and to campus principals with respect to certain defined tasks, such as supervision of personnel. *See* Tex. Educ. Code §§ 11.201, 11.202 (West 1996).

In short, the proper focus in a Title IX damages case is the conduct of the administration of the educational program. *See, e.g.*, Comments of Rep. Mink, 117 Cong. Rec. 39252 (1971) ("Any college or university which has [a] ... *policy* which discriminates against women applicants...is free to do so" but should not ask the taxpayers to support it) (emphasis added). This Court's Title IX and Title VI cases have addressed institutional or administrative policies or practices of

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[24] In light of these narrow definitions of "recipient," courts have held that the only proper defendant under Title IX is the school district itself; individual employees may not be sued. *See Smith*, 128 F.3d at 1018-19; *Lipsett*, 864 F.2d at 884, 901.

[25] *See City of St. Louis v. Praprotnik*, 485 U.S. 130 (1988).

the grant recipient rather than isolated acts by employees. *See, e.g., Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582, 597 (1983) (White, J.) (questioning whether the grantee was aware that it was "*administering* the program in violation of the statute" and whether the plaintiff "has been intentionally discriminated against by the *administrators* of the program"); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (admissions policy case; Congress wanted to avoid supporting "discriminatory practices"); *Univ. of Calif. Regents v. Bakke*, 438 U.S. 265 (1978) (admissions policy); *see also Franklin*, 503 U.S. at 64 and n. 3 (school administrators discouraged student from pursuing discrimination charge under Title IX).

Consistent with Title IX's definitions of "program or activity" and "local educational agency," the Fifth and Seventh circuit courts of appeals have held that a school district will be responsible for abuse by an employee when a manager who "was invested by the school board with the duty to supervise the employee" learned about the abuse but failed to take action that would end the abuse despite having the authority to do so. *See Rosa H.*, 106 F.3d at 659. When administrators engage in intentional discrimination, only then the recipient can be said to have violated the terms of the Title IX contract, and institutional liability may flow from that breach. *See id.* (a federal grant recipient has not sexually harassed a student "unless it knows of a danger ... and chooses not to alleviate that danger").

This approach "locates the acts of subordinates to the board at a point where the board's liability and practical control are sufficiently close to reflect its intentional discrimination." *Id.* at 660. "When a school board confers on a school official the power to take such personnel actions, it makes a deliberate considered judgment about what sort of leadership the district

should have...." *Id.* at 660. Amici agree with this approach because it reflects how school boards actually operate and because it reflects the text and purpose of the statute. Title IX's plain language, coupled with its omission of an agency provision, shows that Congress did not intend to impose open-ended liability based on the conduct of employees in furtherance of their own personal and lurid aims. Limiting the scope of liability is particularly appropriate where the plaintiff is pursuing a private cause of action that has been "implied by the judiciary rather than expressly created by Congress."[26]

Rather than view the omission of an agency provision as an indicator that agency principles will not apply, the Petitioners argue that the omission must mean that Title IX provides for even broader liability than Title VII. In the absence of the word "agent," they posit, there are practically no limitations at all. Their argument ignores the plain language of the statute as described above. Moreover, "[i]f all that is required is that the discrimination occur under a covered program or activity, then there would be no need to adopt a standard for institutional liability--liability would be absolute." *Smith*, 128 F.3d at 1027 n. 15. "For obvious good reasons, Congress did not incorporate agency law in its mandate under Title IX. If Title VII did not include 'agents' in its definition of employer, the Supreme Court in *Meritor* would not have had a statutory basis for adopting agency principles... This obvious distinction between Title VII and Title IX cannot be rationalized into extinction in order to arrive at a conclusion Congress did not direct." *Smith,* 128 F.3d at 1026 n. 12.

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[26] *Guardians*, 463 U.S. at 597; *see also Franklin*, 503 U.S. at 78 (Scalia, J. concurring) (noting the irony in permitting the most expansive of remedies for a judicially created cause of action, "the most questionable of private rights").

When Congress has failed to provide a statutory basis for the application of agency principles, this Court in the past has refused to adopt a federal law incorporating common-law agency principles. *See, e.g., Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978) (municipality cannot be vicariously liable for the acts of its agents).

D. *There is no textual support for Petitioners' agency theory. Moreover, no teacher ever has "apparent authority" to rape a school child.*

This Court should reject the Petitioners' agency argument because there simply is no textual support for it. Moreover, the argument should be rejected because it misapplies traditional agency theory and because, in a school context, it makes absolutely no sense. Petitioners cite Section 219(2)(d) of the Restatement (Second) of Agency, which states that a master will be liable for the acts of the servant if the servant is "purporting to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship." The commentary to the Restatement shows that this provision applies only in the narrowest of circumstances. *Smith*, 128 F.3d at 1029 (citation omitted). The classic examples are the telegraph operator who sends false telegraph messages or a store manager who shortchanges customers. *Id. (*citing § 219, comment e). In these situations, "from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." *Id.* (citation omitted). In the case of sexual harassment, the "transaction" obviously is not regular on its face. In Miss Gebser's, for example, she testified that she knew that the

school district would end the relationship if it was discovered.[27]

Numerous state courts have refused to hold schools liable in teacher/student abuse cases.[28] In *John R. v. Oakland Unified Sch. Dist.*,[29] a case involving a coercive male teacher/male student sexual relationship, the California Supreme Court held that the school district could not be held liable on an agency theory, observing that a "more personal escapade less related to an employer's interests is difficult to imagine." The court in *John R.* rejected the argument that the teacher's abusive actions allegedly flowed from his exercise of job-created authority, concluding that any "connection" between the authority to teach and the occurrence of sexual abuse was too attenuated."[30] The court concluded that the historical policy justifications for vicarious liability fall apart

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[27] Miss Gebser's testimony defeats apparent authority for other reasons. Apparent authority is determined by the conduct of the principal toward the third party, not the agent's conduct toward the plaintiff. *See* Restatement (Second) of Agency § 8, Comment a (1958). Moreover, apparent authority exists only to the extent the third party reasonably believes that the agent is authorized to do the act. *Id.*, comment c.

[28] *See, e.g., John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948 (Calif. 1989) (rejecting vicarious liability in teacher/student abuse case); *Mary KK v. Jack LL*, 203 A.D.2d 840, 611 N.Y.S.2d 347 (1994) (rejecting vicarious liability in teacher/student abuse case); *Bratton v. Calkins*, 870 P.2d 981 (Wash. App. 1994) (rejecting vicarious liability in teacher/student abuse case); *Lourim v. Swensen*, 936 P.2d 1011 (App. Or. 1997) (rejecting vicarious liability in Boy Scout leader/scout abuse case); *Doe v. Village of St. Joseph*, 415 S.E.2d 56 (Ga.App.1992) (rejecting vicarious liability in boarding school abuse case).

[29] 769 P.2d 948 (Calif. 1989).

[30] *Id.*

when applied in a school context:

> 'The principal justification for the application of the doctrine of respondeat superior ... is the fact that the employer may spread the risk through insurance and carry the cost thereof as a part of his costs of doing business.' [citation omitted] .... 'The acts here differ from the normal range of risks for which costs can be spread and insurance sought ...'[31]

Schools are not for-profit "businesses" that can pass along "costs" to consumers.

In short, apparent authority has no place in this case. No public school teacher has *apparent authority* to commit statutory rape or other crimes against a child. Miss Gebser, the student in this case, testified that she knew that the school district would condemn the relationship if it knew about it. In the end, use of pure agency principles would be tantamount to imposition of strict liability, which would be financially devastating to schools and which, as previously shown, would be contrary to the language and purpose of Title IX.

E. The Court must not adopt a standard that would discourage teachers who legitimately mentor their students.

It bears stating the obvious: most teachers are not molesters and seducers. Frank Waldrop is a horrible exception, not the rule. The Court must be careful not to adopt a standard that would discourage the development of the nurturing teacher/student relationships that characterize our best schools.

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[31] *John R.*, 769 P.2d at 956.

Adults often speak of the teacher "who turned my life around" by giving personal attention. They speak of the teachers who counseled them during difficult adolescent times or spent hours after school in private tutoring to help them convert a B into an A--or an F into a C. They speak of coaches who gave victory parties in their homes. Even federal law speaks of mentors who work with a youth "on a 1-to-1 basis establishing a supportive relationship." 20 U.S.C. § 8801(19). While school administrators must diligently observe faculty and make appropriate inquiries about discriminatory or criminal behavior, they are not equipped to engage in psychoanalysis and police tactics. The Court must not adopt a standard that would induce program administrators to discourage teachers who legitimately mentor their students. *See John R.*, 769 P.2d at 956, 957 (vicarious liability would induce schools to impose rigorous controls on any interaction between teachers and students).

F. *Constructive knowledge is, at its core, is a negligence standard and, thus, cannot support a claim for damages.*

The Petitioners also propose a constructive knowledge standard. Under Title VII law, an employer is deemed to have notice of sexual harassment if a person in a management position knew or should have known of the harassment and failed to stop it.[32] This standard is grounded in negligence[33]

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[32] *See Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988). These cases demonstrate another flaw in Petitioners' argument that classroom teachers are analogous to supervisors under Title VII. Title VII makes employers liable for the acts of supervisors because supervisors are, in essence, the employer. However, given that the bulk of employees in most businesses are *not* supervisors, the pool of potential Title VII tortfeasors is relatively

and, therefore, may not support a claim for damages under Title IX, which requires proof of an intentional violation. *Smith*, 128 F.3d at 1029 (citations omitted); *Rosa H.*, 106 F.3d at 656 (Congress did not intend to burden public school districts with "open-ended negligence liability").

A major difficulty with the negligence theory is that it is usually impossible to detect the occurrence of sex misconduct by a teacher. If school districts are held liable for what a jury (with the benefit of hindsight) decides the school district "should have known," then school districts will be held liable, in damages, even though they lacked knowledge or any intent to discriminate on the basis of gender. In this case, for example, the teacher's use of a few crude comments, while offensive and inappropriate, was not an indicator that the teacher would engage in sexual intercourse with a student.[34] Moreover, in response to the complaint about the comments, the principal promptly arranged a parent/teacher conference, and he gave a warning to the teacher. No further complaints were received. Although the Petitioners (with the benefit of hindsight) now criticize the principal's response, there is no

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small. In a school, the *majority* of all employees are teachers. *See* Texas Education Agency, *supra*, note 3, p.18. Under Petitioners' proposal, the pool of potential Title IX tortfeasors would be enormous.

[33] *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990).

[34] No pre-employment screening would have prevented the employment of Frank Waldrop, who had no criminal history. Moreover, the chances are "slim"--around 5 percent--that any given child abuser will have a criminal record. *See* American Bar Association, Center on Children and the Law, Effective Screening of Child Care and Youth Service Workers p. 25 (1994).

suggestion whatsoever that the principal discriminated on the basis of gender, that he ignored any indicators that the teacher was engaging in sexual misconduct, or even that the principal had a practice of disregarding complaints of harassment. Indeed, the parent who complained testified that the principal was a "good principal" and that he took her allegations seriously. (Tully depo. p. 36, attached to Plaintiff's response to Defendant's motion for summary judgment.)

In *Rosa H.*, the Fifth Circuit held the plaintiff must show that an administrator knew that the teacher posed a "substantial risk" of sexual harassment but failed to respond to that risk. 106 F.3d at 659. The court determined that any lower standard would result in imposition of a negligence standard. The distinction is important because, to obtain money damages in a Title IX action, the plaintiff must show intentional discrimination, not negligence. *Franklin*, 503 U.S. at 74-76.

G. *Title IX imposes a duty not to discriminate; it does not impose an "affirmative duty" to "guarantee" that harassment will never occur, as argued by the Petitioners.*

The Petitioners assert that Title IX creates an "*affirmative* duty ... to *insure* a school environment free of discrimination."[35] Neither the language of Title IX nor *Franklin* requires schools to act as insurers or guarantors. *Franklin* does not impose a duty "to insure"; it states that schools have a "duty not to discriminate on the basis of sex..." *Franklin*, 503 U.S. at 75. The Petitioners' argument that

[35] Petitioners' Brief at 16. Petitioners also state that schools must "guarantee" no discrimination will occur. *Id.* at 17.

schools must guarantee "a *school environment* free of discrimination" also ignores the fact that the sexual abuse in this case did not occur at school--it occurred at the student's own home and in other off campus locations. Parents, not schools, are often in a much better position to have knowledge of their children's activities and to question them about where and how they are spending their time after school. In this case, for example, unbeknownst to school officials, the teacher regularly visited Miss Gebser at her home and transported her in his personal vehicle.

The Petitioners suggest that schools have a duty to direct their teachers not to have sex with students. It does not take a written school regulation for a teacher to know that he cannot beat, kill, or molest a student. Long before Title IX, Texas, like all states, criminalized indecency with a minor. *See* Tex. Penal Code § 21.11 (West 1994). Similarly, educators (like most professions) operate under a code of professional standards. Because of the state-mandated teacher code of ethics, Texas teachers have long known that they will lose their jobs and teaching certificates if they engage in inappropriate conduct with students. *See* Code of Ethics and Standard Practice for Texas Educators, 19 Tex. Admin. Code § 177.1 (West 1997). The code prohibits teachers from using "institutional or professional privileges" for personal advantage, requires them to comply with all state and federal laws, prohibits them from discriminating against students on the basis of gender, and requires them to protect students from conditions detrimental to their physical health and mental health. *Id.* A school district that hires a teacher may presume that the teacher will comply with the standards of the profession.

IV. Petitioners' Brief ignores the complexities of preventing sexual abuse of children.

The Petitioners' Brief suggests that their proposals will prevent harassment claims. Regrettably, no legislation can guarantee schools will be free of abuse and harassment. People who are attracted to minors are a "diverse and complex population for which no single profile exists."[36] Because of the unpredictability of human beings, even the most vigilant school district may find that one of its employees has crossed the line. Sexual abuse of children is a vastly different social problem than sexual harassment of adults, and the usual prevention methods will not always work. The liability standards proposed by the Petitioners must be rejected because they will not achieve the goal of abuse prevention and because they, at their core, are all variations of strict liability--a standard that is contrary to public policy and contrary to the plain language and purpose of Title IX. Rather than solve the harassment issue, Petitioners' liability standards merely will divert money away from those programs and efforts designed to help schools tackle this difficult issue.

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[36] American Bar Association, Center on Children and the Law, Effective Screening of Child Care and Youth Service Workers p. 77 (1994) [hereinafter "ABA Study"]. The study was the first major evaluation of school and child care employment screening practices and their effectiveness. The ABA study was prepared under a grant from the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice. *See also* Myers et al, "Expert Testimony in Child Sexual Abuse Litigation," 68 Neb. L. Rev. 1 (1989) (clinical research indicates that adults who sexually abuse children are a heterogeneous group with few shared characteristics).

Between 1985 and 1990, reported incidents of child abuse (including sexual abuse) increased 31 percent.[37] Most all these incidents occurred at home, with only 1 to 7 percent of all cases occurring in schools, day-care centers, and other out-of-home settings.[38] Congress and the State Legislatures have responded with a variety of measures, all of which have attendant costs. All 50 states, including the State of Texas, now have penal statutes that hold school personnel criminally liable if they fail to report suspected child abuse to law enforcement authorities.[39] The National Child Protection Act of 1993 improves the procedures for collecting and computerizing abuse data and for conducting criminal checks on people who work with children.[40] State legislatures have responded by developing child abuse and sexual offender registries[41] and by adopting legislation that makes it easier for schools to obtain criminal history information on applicants.[42]

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[37] ABA Study, p. 8.

[38] ABA Study, p. 8.

[39] *See, e.g.*, Tex. Family Code § 261.101 (West 1996).

[40] 42 U.S.C. § 5101-5119c (1997).

[41] ABA Study, appendix (listing statutes).

[42] *See, e.g.*, Tex. Educ. Code §§ 22.081-084 (West 1996) (mandating that the State Board for Educator Certification obtain criminal history information on all individuals seeking teaching certificates and authorizing school districts to pull the criminal history of applicants). Significantly, implementation of these procedures is not cost free. Every background check requires payment to the law enforcement agency conducting the check, and employees must be trained to review and interpret the criminal history checks. ABA Study, p. 29-32.

Publishers have developed and now offer comprehensive training materials to help school employees with the prevention and investigation of abuse and harassment allegations. Training seminars for school personnel are now widely available, which simply was not the case in the years prior to the *Franklin* decision. While school districts can and should budget for these programs and activities, it is entirely another matter to ask them to "budget" for a large damages claim based on employees' secretive acts of sexual misconduct.

The National School Boards Association and the New Jersey School Boards Association therefore urge the Court to adopt the standard proposed by the Fifth Circui for actions for damages. This standard does not, as argued by the Petitioners, encourage school officials to keep their heads in the sand. The school that fails to respond to concerns about harassment may be sued under Title IX, may be subjected to a time-consuming on-site investigation by the Office for Civil Rights, or may lose its federal funding. School board members may find themselves defeated in the next election. School administrators may be subjected to criminal penalties under state law for failing to report suspected child abuse. They may lose their jobs and their certificates. In many states, tort law also is a source of liability. In the end, the greatest incentive for professional educators to respond diligently to allegations of harassment and abuse is not legal but moral and pedagogical: people in the school business do not want children to suffer. They care about kids, and when they suspect harm, they will act.

CONCLUSION

The judgment of the court of appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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DATED: February 13, 1998

APPENDIX A

UNITED STATES DEPARTMENT OF EDUCATION
Washington, D.C. 20202

Nov. 12, 1993

Mr. Craig M. Atlas
Scolaro, Shulman, Cohen, Lawler, Burstein & Ferrara, P.C.
90 Presidential Plaza
Corner of Townsend and Harrison Streets
Syracuse, New York 13202

Dear Mr. Atlas:

It is my pleasure to respond to your letter asking for information about sexual harassment in elementary and secondary education. In your letter, you specifically asked if the U.S. Department of Education Office for Civil Rights (OCR), has any information about suggested sexual harassment policies. You also asked whether there were any reported cases (or other information) on the following two issues: student-to-student sexual harassment at the primary education level, and what limits a school district should impose regarding hugging or other touching of students by staff members.

To date, we have found the following Title IX cases on sexual harassment in elementary and secondary education: Gwinnett v. Franklin County Public Schools, 112 S.Ct. 1028 (1992); Patricia H. v. Berkeley Unified School District, -- F.Supp. --, 1993 WL 33510 (N.D. Cal.); and Doe v. Petaluma City School District, -- F.Supp. --, 1993 WL 359872 (N.D. Cal.).

I have enclosed the only existing OCR policy guidance on sexual harassment. Please note that this document was issued in 1981. While the procedural guidance is still good, the case law is outdated. This policy is currently under revision, and we are incorporating the issue of sexual harassment in elementary and secondary schools.

As for model sexual harassment policies for elementary and secondary schools, both the American Association of University Women (AAUW) and the National School Boards Association have sample policies. They may be contacted at the following addresses:

AAUW
Program and Policy Department
1111 16th Street, N.W.
Washington, D.C. 20036
(202) 785-7700

National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6722

We have not reviewed these policies, and we can not endorse them. However, they may be useful to your client. In addition, if either you or your client are trying to develop such a policy, you should also feel free to contact our regional technical assistance staff at the following address:

Ms. Paula D. Kuebler
Regional Civil Rights Director
Office for Civil Rights, Region II
U.S. Department of Education
26 Federal Plaza, 33rd Floor
Room 33-130, 02-1010
New York, New York 10278-0082

I hope this information is helpful to you.

Sincerely,

Stacey Roseberry
Attorney Advisor
Elementary and Secondary
Education Policy Division
Office for Civil Rights

Attachment
As stated